No. 78-1399

In the

Supreme Court of the United States

OCTOBER TERM, 1978

CHICAGO-MIDWEST MEAT ASSOCIATION,
a not-for-profit corporation,

Petitioner,

vs.

CITY OF EVANSTON, a municipal corporation, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Nine of the twelve defendant municipalities/villages herein join to present this response to the Petition for Writ of Chicago-Midwest Meat Association. Joint respondents are the City of Evanston, City of Elgin, Village of Oak Park, Village of Skokie, Village of Morton Grove, City of Niles, City of Chicago Heights, City of Des Plaines, and Village of Norridge. These same parties joined in the defense below.

The petitioner seeks to invalidate the respective local ordinances under which the Municipalities carry out health inspections and licensing of food delivery vehicles. The claim of preemption is grounded upon the Federal Wholesome Meat Act. Because respondents believe petitioner has misstated the facts, the holding below, and the questions presented for review, these will be addressed in addition to the argument.

QUESTIONS PRESENTED

1. Whether the Federal Wholesome Meat Act of 1967, 21 U.S.C. 601 *et seq.* preempts public health ordinances promulgated under delegated state police powers and pursuant to which food (including meat) delivery vehicles are licensed and inspected by local health officials.

2. Whether the ordinances in question contravene the commerce clause of the United States Constitution, Article I, Section 8, cl. 3.

3. Whether the ordinances in question contravene the supremacy clause of the United States Constitution, Article VI, cl. 2.

4. Whether the Court of Appeals erred in upholding the Summary Judgment granted respondents by the District Court.[1]

ADDITIONAL CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article I, Section 8, cl. 3.

> "The Congress shall have power to . . . regulate commerce with foreign nations, and among the several states, and with the Indian Tribes."

United States Code, Title 21, §602.

> "Meat and meat food products are an important source of the Nation's total supply of food. They

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[1] While mindful of the requirements of the Supreme Court Rule 40 that respondents may not "raise additional questions or change the substance of the questions already presented", we respectfully suggest: (a) that petitioner's question 1 contains a conclusion of fact about alleged daily federal vehicle inspections which allegation was not contained in petitioner's Complaint before the Court below, but was asserted in its Cross-Motion for Preliminary Injunction, the denial of which is not before this Court. Said allegation, therefore, cannot be among those assumed to be correct for purposes of reviewing the rulings on respondents' Motion for Dismissal/Summary Judgment; (b) that petitioner's question 2 contains in the first subclause petitioner's own conclusion of law that there was explicit preemption in the Wholesome Meat Act whereas this is actually an issue which would fit within their first question as to whether preemption exists; (c) that petitioner's question 3 is totally incorrect, the Court of Appeals having never "construed" the local ordinances complained of. At issue was whether the Wholesome Meat Act preempted local ordinances, the content and procedures of which were admitted true as pleaded for purposes of respondents' Motion to Dismiss/Summary Judgment.

are consumed throughout the Nation and the major portion thereof moves in interstate or foreign commerce. It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged. Unwholesome, adulterated, or misbranded meat or meat food products impair the effective regulation of meat and meat food products in interstate or foreign commerce, are injurious to the public welfare, destroy markets for wholesome, not adulterated, and properly labeled and packaged meat and meat food products, and result in sundry losses to livestock producers and processors of meat and meat food products, as well as injury to consumers. The unwholesome, adulterated, mislabeled, or deceptively packaged articles can be sold at lower prices and compete unfairly with the wholesome, not adulterated, and properly labeled and packaged articles, to the detriment of consumers and the public generally. It is hereby found that all articles and animals which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce, and that regulation by the Secretary and cooperation by the States and other jurisdictions as contemplated by this chapter are appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers."

United States Code Title 21, §661(a).

"(a) it is the policy of the Congress to protect the consuming public from meat and meat food products that are adulterated or misbranded and to assist in

efforts by State and other Government agencies to accomplish this objective..."

STATEMENT OF CASE

This case was initiated by a complaint seeking declaratory and injunctive relief brought by petitioner, Chicago-Midwest Meat Association, ("Chicago-Midwest") on August 25, 1977. Chicago-Midwest sought to enjoin twelve (12) northern Illinois municipalities or villages ("Municipalities") from licensing and inspecting food delivery vehicles pursuant to their respective ordinances. Chicago-Midwest was acting as a representative plaintiff on behalf of its member "persons, firms, or corporations" located in the midwest and engaged in the manufacturing, processing, and wholesaling of meat food products. Petitioner claims that its members are governed by the Federal Wholesome Meat Act of 1967, 21 U.S.C. 601 *et seq.*, and that said Act preempts all municipal licensing and inspection of meat food product delivery vehicles.

Respondents' Motion to Dismiss presented four grounds: that the Complaint failed to state a claim upon which relief could be granted, that Chicago-Midwest was not the real party in interest, that the failure to join the actual companies or individuals whose vehicles were subject to the licensing and inspection activities complained of prevented the accord of complete relief, and that the Federal District Court should decline under comity principles to take the suit because a pending State (municipal) Court action (since decided) gave Chicago-Midwest a forum to present its defense of Federal preemption. The only ground being appealed to this Court is the granting of the Federal Rule of Civil Procedure 12b(6) Motion to Dismiss for Failure to State a Claim. Petitioner also

filed a Cross-Motion for Preliminary Injunction. Neither party requested evidentiary hearings on the Motion to Dismiss, nor on the Motion for Preliminary Injunction. On March 8, 1978 the District Court entered a memorandum opinion and order denying Chicago Midwest's Motion for Preliminary Injunction and granting the Municipalities' Motion to Dismiss. That order was appealed to the Seventh Circuit.

On the Motion to Dismiss the District Court had before it Evanston Ordinance 98-0-61, the affidavit of William Embry, Chief of Evanston's Division of Environmental Health, and a copy of the form used for delivery truck inspections within Evanston. The Village of River Forest attached to its separate brief in support of the Motion to Dismiss a copy of its Code, Section 14.1. Chicago-Midwest submitted no affidavits in opposition to the Motion to Dismiss.

Submitted with Evanston's memorandum opposing the Motion for Preliminary Injunction were the Embry affidavit and the affidavit of Steven J. Stevens, Evanston Health Inspector. Submitted by the City of Oak Park with its memorandum opposing the Preliminary Injunction Motion was the affidavit of its Health Director, James D. Tills. River Forest submitted the affidavit of Dr. Charles Weigel, its Health Commissioner, along with a list of inspections carried out by the Village.

The affidavits of the Municipalities were specific. Dr. Weigel stated that to his knowledge no food delivery vehicles were inspected by the United States Department of Agriculture within the boundaries of River Forest and that there was a necessity to inspect delivery vehicles delivering to retail stores within the Village of River Forest

to be certain that spoilage and contamination had not occurred. Oak Park Health Director James D. Tills reported inspection findings of storage refrigeration temperatures higher than the state maximum, delivery of an illegal preservative, and unwrapped meat on the floor of a truck.

Evanston Inspector Stevens stated that inspections were carried out when the vehicles stopped to deliver, that they took from five to ten minutes, that no citations were issued, and that the trucks were never seized. Mr. Stevens further stated that the purpose of these inspections was to ascertain that the products were not spoiled or contaminated by vermin, dirt, leakage, and temperature changes. Not one counter-affidavit in reply to any municipal affidavits was submitted by petitioner.

The "Statement of Facts" in the Petition for Writ repeats the allegations from the petitioner's Complaint below and from affidavits that had been submitted in support of petitioner's Cross-Motion for Preliminary Injunction, but it does not even refer to the Motion to Dismiss ruled on by the District Court, to its attachments, or to the affidavits of the other local health officials referred to above that were before the District Court in opposition to petitioner's Cross-Motion for Preliminary Injunction.

The District Court, in granting the Motion to Dismiss, held that "no effective preemption claim has been stated because the ordinances here in question do not conflict with the quoted portions of the Act".[2] The Court of Appeals held that summary judgment was proper in face of the District Court's finding of no triable issues of fact

[2] Petition for a Writ of Certiorari, 78-1399 at 17a.

and its holding that as a matter of law the Act did not preempt the ordinances. The Court of Appeals further stated that:

> "If we assume the existence of all the facts alleged by the association, its challenges to the local ordinances fail nonetheless. We have concluded that the supremacy and commerce clauses allow municipalities to enact and enforce ordinances providing for the inspection of meat delivery vehicles at locations other than the premises of establishments regulated by the Act."[3]

Finally, the Court of Appeals examined the Congressional history of the Act and specifically of Section 678[4] and concluded that "far from intending to preempt the entire field of meat inspection, Congress designed the Act to "protect the consuming public from meat and meat food products that are adulterated or misbranded, and to assist in efforts by State and other Government agencies to accomplish this objective. 21 U.S.C. 661(a)"[5]

[3] 7th Circuit Opinion, page 6a of Petition for a Writ.

[4] Denominated Section 408 in the Predecessor Statute, 21 U.S.C. 71 *Et seq.* and frequently referred to as Section 408 by the Court of Appeals and in the Petition.

[5] Petition for a Writ at p. 7a.

ARGUMENT FOR DENIAL OF THE WRIT

The Petition for Writ should be denied. The decision of the Court of Appeals was fundamentally correct and consistent with the many recent and past cases wherein the Supreme Court analyzed and set the perimeters for evaluating preemption attacks on state sovereign police power enactments. The Court of Appeals examined the language of the Wholesome Meat Act, the many expressions of policy found throughout the Act, and the intent of Congress as reflected in Committee notes.

Respondents believe that this case does present an issue of great importance, the resolution of which impacts on long-established public health protective ordinances which are common to municipalities across the country. If the Court does decide to grant the Writ it should not permit certain unsupported gratuitous conclusions of the petitioner to cloud the fundamental issues properly presented, brought up, and now before it. The petitioner claims detriment because the Court of Appeals did not have before it the ordinances of each respondent Municipality. But for purposes of granting the Summary Judgment, all of petitioner's well-pleaded allegations as to the procedures and effect of the Municipalities' ordinances on petitioner's members' operations were taken as proven. The Court of Appeals did have before it the ordinances of Evanston and River Forest, and the Municipalities never disputed that they conduct inspections during unloading or delivery of food from vehicles within their boundaries.[6]

[6] While the Court of Appeals accepted the unsupported comments made by petitioner's counsel in oral argument, (see footnote 2 of decision at p. 3a of Petition for Writ) the Municipalities have always denied that they stop vehicles merely proceeding through their limits en route to extra-territorial locations. Moreover, this allegation

I

THE COURT OF APPEALS CONSIDERED BOTH THE STATUTORY LANGUAGE AND ITS LEGISLATIVE HISTORY.

Petitioner argues that because its member organizations operate federally-inspected meat processing "establishments", the vehicles loaded at and subsequently transporting meat many miles and possibly days removed from those establishments cannot be inspected by municipal health officials. Petitioner bases its claim primarily on one sentence in Section 678 of the Federal Wholesome Meat Act. The sentence reads:

> "Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided under subchapter I of this chapter, which are in addition to, or different than those made under this chapter may not be imposed by any State or Territory or the District of Columbia, except that any such jurisdiction may impose recordkeeping and other requirements within the scope of section 642 of this title, if consistent therewith, with respect to any such establishment." 21 U.S.C. 678, (21 U.S.C. 408, 1902)

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[6] (Continued)
was contained in petitioner's Cross-Motion for Preliminary Injunction but not in petitioner's Complaint so it is not properly before the Court on this appeal. It is an illogical claim lacking any supporting evidence and unbacked by affidavits of any kind. Indeed it was directly contradicted by the specific affidavits of River Forest Official Weigel and Evanston Official Stevens, affidavits never countered by petitioner.

The Court of Appeals considered petitioner's argument that "operations" of regulated establishments extend beyond their premises:

> "when we consider that word in the context of section 408, we do not believe that Congress intended to give it such an expansive meaning. The legislative history of §408 confirms our conclusion . . . the Senate Committee on Agriculture and Forestry stated: 'Section 408 would exclude States . . . from regulating *operations at plants* inspected under (subchapter) 1 . . .'". (emphasis added by Court of Appeals, unreported opinion 78-1468, Dec. 14, 1978 at p. 8a, Petition for Writ)

In refusing the "expansive" meaning sought by petitioner, the Court of Appeals followed the rule of statutory construction that words are to be given their plain and ordinary meaning "in the absence of persuasive reasons to the contrary". *Banks* v. *Chicago Grain Trimmers Association,* 1968, 390 U.S. 459, 465, 88 S.Ct. 1140, 20 L.Ed. 30, rehearing denied 88 S.Ct. 1800, 391 U.S. 929, 20 L.Ed. 2d 671. It also followed the procedure, properly used when doubt exists, of recourse to reports of Committees of Congress to ascertain legislative intent. See *FTC* v. *Manager, Retail Credit Co., Miami Branch Office, C.A.D.C.,* 1975, 515 F.2d 988.

Moreover, that plant site inspection programs constituted the primary thrust of the statute has been a generally accepted conclusion: "The general aim of this new Act was to require that *all* meat plants, whether interstate or intrastate, be subjected to the same inspection standards and maintain substantially the same facilities". 4 *Creighton Law Review* 86. See also letter to Senate President Hubert Humphrey of February 23, 1967 from

Acting Secretary of Agriculture Schnittker. U.S. Code Cong. & Ad News 2210.

The Court of Appeals, having both determined the "plain and ordinary meaning" of the phrase "premises facilities and operations" and examined the legislative history of the section, reached the only consistent and plausible statutory interpretation.[7]

II

THE REGULATIONS PROMULGATED UNDER THE ACT ALSO SUPPORT THE COURT OF APPEALS' HOLDING

Because the Court held that the statute itself does not preempt the ordinances, there was no necessity to also examine the regulations promulgated under the statute. Nonetheless, the Court of Appeals did look to the regulations and found that:

> "these provisions simply set forth the standards to be used by federal officials carrying out the inspections allowed by the Act of facilities and delivery vehicles on the premises of the regulated establishments. By providing for delivery vehicle inspection away from the premises of these establishments, the

[7] The Court of Appeals examined 21 U.S.C. 661(a) which states that "it is the policy of Congress to protect the consuming public from meat and meat food products that are adulterated . . . and to assist in efforts by state and other government agencies to accomplish this objective". The District Court had examined 21 U.S.C. 602 and also concluded that action by the state was contemplated. See p. 17a of Petition for a Writ.

> ordinances at issue here obviously do not conflict with the standards embodied in the provisions."[8]

The Court's holding squarely fits with the content of the regulations. Regulation 9 C.F.R. 325.1(c), provides standards for the transportation of meat/food products. The regulation does describe the sanitary requirements of the means of conveyance and does discuss enclosures, sealing, and refrigeration. But it *also* states:

> "The decision whether or not to inspect a means of conveyance in a specific case and the type and extent of such inspection *shall be at the Program's discetion* and shall be adequate to determine if the product in such conveyance is, or *when moved could become, adulterated.*" 9 C.F.R. 325.1(c), sentence five. (emphasis added)

Yet petitioner would base its claim that it should be free from "local interference" on a regulation that baldly states that there is *discretion* within the federally approved establishment as to the nature and extent of inspection of conveyances prior to their departure and that actually *contemplates* the problem of adulteration occurring en route. Respondents also respectfully refer this Court to our discussion of these and other regulations at pages 8-9 of their defendants-appellees' brief before the Seventh Circuit.

III

DECISION OF COURT OF APPEALS FOLLOWS CONSISTENT PAST AND RECENT HOLDINGS BY THIS COURT.

The decision below is completely in accord with the many cases where the Supreme Court has repeatedly sustained the

[8] P. 10, Court of Appeals, supra.

fundamental and traditional state sovereign police powers to protect health. The preemption test for state regulations promulgated under this power is a stringent one:

> "Only a demonstration that complete ouster of state power—including state power to promulgate laws not in conflict with federal laws—was the 'clear and manifest purpose of Congress' would justify a conclusion that state authority to regulate in areas of vital state interest is preempted." *DeCanas* v. *Bica,* 1976, 424 U.S. 351, 47 L.Ed. 2d 43, 96 S.Ct. 933, quoting *Florida Lime and Avocado Growers,* infra.

The Court addressed an interstate commerce preemption attack on a state statute that forbid price advertising of eyeglasses. The Court acknowledged that the State Supreme Court injunction against the advertising:

> "has unquestionably imposed some restraint upon that commerce. But these facts alone do not add up to an unconstitutional burden on interstate commerce . . . In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that Constitution when 'conferring upon Congress the regulation of commerce . . . never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country' . . ." *Head* v. *Board of Examiners,* 1963, 374 U.S. 421, 427, 428, 10 L.Ed. 2d 983, 83 S. Ct. 1963, quoting *Huron Portland Cement Co.* v. *Detroit,* infra.

The Court of Appeals in reaching its decision acted consistently with the Supreme Court's balancing approach as expressed in *Head,* and analyzed the relative burden on interstate commerce posed by respondents' food vehicle inspection ordinances:

> "The ordinances regulate evenhandedly to effectuate a highly legitimate local public purpose and their effect on interstate commerce is not clearly excessive in relation to the local benefits brought about by their enforcement." (7th Cir. pg. 13a, Petition for Writ).

Major local "interference" with commerce has been upheld where the public health was at stake in a case where the preemption attack concerned a municipal smoke abatement ordinance enforced against a federally licensed, inspected and approved cement vessel in interstate commerce.

> "the ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air that people breath clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government." *Huron Portland Cement Co.* v. *Detroit,* 1960, 362 U.S. 440, 442, 4 L.Ed.2d 852, 80 S.Ct. 813.
>
> "In determining whether state regulation has been preempted by federal action, 'the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be . . . . implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State'." *Huron Portland Cement,* supra, 362 U.S. 443, quoting *Savage* v. *Jones,* 1912, 225 U.S. 501, 533, 56 L.Ed. 182, 32 S.Ct. 715.

The public health and local interest in food product purity has also been addressed on several occasions by the Court. It recognized that "the supervision of the readying of foodstuffs for markets has always been deemed a matter of peculiarly local concern" in a supremacy clause attack by Florida avocado growers upon a California statute requiring a higher minimum oil content in avocados than federally-allowed Florida standards.

> "There is neither such actual conflict between the two schemes of regulation that both cannot stand in the same area, nor evidence of a congressional design to preempt the field." *Florida Lime and Avocado Growers, Inc.* v. *Paul,* 1963, 373 U.S. 123, 10 L.Ed. 2d 248, 83 S.Ct. 1210, rehearing denied 374 U.S. 132, 10 L.Ed. 2d 248, 83 S.Ct. 1861.

As far back as 1902 this Court supported a state health police power statute in the face of an attack by the owner of cattle that were federally certified to be free from infectious diseases. The plaintiff cattle owner refused to submit his stock to state inspection for a certificate under a Colorado law which he argued was repugnant to the commerce clause. The Supreme Court agreed that the transportation of livestock from state to state was a "branch of interstate commerce" and that any lawful Congressional regulation would be paramount. However, the Court found that the federal statute in question did not cover "the whole subject of the transportation of livestock, and left a wide field for the exercise by the states of their power by appropriate regulations to protect their domestic animals against contagious, infectious and communicable diseases." *Reid* v. *Colorado,* 1902, 187 U.S. 137, 147. See also *Mintz* v. *Baldwin,* 1933, 289 U.S. 346.

Respondents submit that the Court of Appeals' finding herein was virtually analagous. The Wholesome Meat Act simply does not "legislate" in the area of delivery site vehicle inspection covered by the municipal ordinances. If there were two "schemes of regulation" (which there are not because of the discretionary nature of vehicle inspections under regulation 325.1, see discussion at p. 13) both could stand. The Court also found no constitutional infirmities.

IV

COURT OF APPEALS' DECISION PROPERLY DISTINGUISHES JONES V. RATH, WHERE THERE WAS SPECIFIC PREEMPTION LANGUAGE FOR PACKAGE LABELING.

Petitioner argues that the decision of this Court in *Jones* v. *Rath Packing Company,* 1977, 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed. 2d 604 calls for reversal of the ruling in this case. However, petitioner has consistently and inexplicably ignored the unavoidable reality that the issue before the Court in that case was the contents of labels and that such topic has its *own* language in the same section of the statute, immediately following the sentence that petitioner cites. The Court of Appeals made and noted this crucial distinction in its decision.[9] The second sentence upon which the *Jones* v. *Rath* conclusion was based reads:

> "Marking, labeling, packaging or ingredient requirements in addition to or different than, those made under this Act, may not be imposed by any state or territory . . . with respect to articles prepared at any establishment under inspection in accordance with the requirement under this Act."

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[9] Petition for Writ at p. 11a, Footnote 7.

Therefore, the conclusion of the Court in *Jones* v. *Rath* has no relevance for the facts and law of this case. Because of the explicit preemption language concerning meat package labeling, the Supreme Court properly proceeded in that case to the second step analysis of whether the state label requirements were "in addition to or different than" the label requirements under federal regulation. That "second step" analysis is never reached or called for here. Moreover, petitioner's effort to utilize the words of Section 624, "transporting in or for commerce", which describe the "persons, firms or corporations" *subject* to the storage and handling regulations, to argue that the transportation itself is a separate subject of regulation simply is without logic.

Petitioner argues that the fact that the Wholesome Meat Act is "silent" on the issue of off-premises vehicle inspection is a "neutral" fact not to be interpreted as allowing off-premises inspections. What the petitioner ignores, but the Court of Appeals did not, is the decidely non-neutral language in the same section indicating a Congressional intent to maintain the traditional police power role of states, and to enlist state/local enforcement. Section 678 specifically permits concurrent jurisdiction for purposes of "*preventing distribution of adulterated or misbranded articles*", and as the Court of Appeals noted, the affidavits of municipal officials showed that adulterated meat has been found during the local inspections.[10]

Petitioner submits that "the Court brought to bear the test giving the greatest latitude to state regulation when it should have applied the (allegedly explicit pre-emption) test laid down by this Court in *Jones*.[11] Again, the "test"

[10] Petition for a Writ, at p. 12a, Footnote 8.

[11] Petition for a Writ, at p. 17.

in *Jones* required examination of the state labeling requirements in light of *specific* federal prohibitory language against different or additional labeling. Petitioner then argues that the legislative history which the Court of Appeals relied upon in defining the terms "establishment" and "operations" is based on "neutral" language in the Senate Committee report. But the report on Section 408 stated:

> "Section 408 would exclude states, territories and the District of Columbia from *regulating operations at plants* inspected under Title I. (emphasis added) S. Rep. No. 799, 90th Cong., 1st Session, reprinted in 1977, U.S. Code Cong. and Ad News 2188, 2207.

The word "operations" thus was actually tied into the plant location by the Senate Committee. Nothing could be clearer, or less "neutral".

Petitioner talks vaguely about different levels or degrees of preemption and argues that the Court of Appeals used a "narrow implicit preemption test" that gave the greatest latitude to a favorable finding for the municipal powers. Nowhere is this argument borne out in reading the decision. The Court of Appeals unequivocally held that "the Act does not explicitly or impliedly preempt these local ordinances", not did it find the activities barred under the commerce and supremacy clauses. Moreover, for traditional state police power activities the Supreme Court has, as analyzed above, followed a consistent approach giving such latitude, absent explicit language.

V

THERE WAS NO ISSUE LEFT FOR BRIEFING AND ALL OF PETITIONER'S ALLEGATIONS WERE PRESUMED TRUE.

Petitioner argues that neither it nor respondents were given an opportunity to fully explore and brief "the issues the Court (of Appeals) dealt with". Respondents do not know to what issues petitioner refers. The Court of Appeals did state that petitioner's allegations before the District Court stated a claim upon which relief could be granted and did also state that the District Court "technically" erred in dismissing the Complaint. By technical error it meant that because the Motion to Dismiss was converted into a Motion for Summary Judgment by the presence of and consideration of materials outside of the pleadings the Court should have informed the plaintiff "that it intended to treat the defendant's Motion to Dismiss as a Motion for Summary Judgment". That is the only error which the Court addresses. But the Court of Appeals *also* stated that "taking all of plaintiff's allegations as true for purposes of ruling on the Motion to Dismiss, plaintiff's challenges fail nonetheless. In view of this absolutely clear ruling, what could petitioner "fully explore and brief"? The best it could have done would be to prove all of its allegations, the truth of which was *presumed* for purposes of respondents' Motion to Dismiss. Petitioner had before it the same Federal Rules of Civil Procedure 12 and 56 available to respondents, yet it never even countered respondents' affidavits, the contents of which were therefore left unchallenged.[12]

As for petitioner's complaint that the Court of Appeals did not have before it ordinances of eleven (in reality ten) of the twelve Municipalities, it is very late for such a protest from petitioner, who brought an allegedly verified Complaint before the District Court, yet never made efforts to obtain the ordinances whose contents presumably were the basis for the entire Complaint. To repeat, all of petitioner's allegations as to the activities carried out under the "absent" ordinances were *taken* as true, yet now petitioner claims prejudice because the Court did not consider the actual documents that the petitioner never at any stage sought to place before it. This is a bad faith argument.

CONCLUSION

The decision of the Court of Appeals is correct. It provides both a logical interpretation of the statutory language and a correct analysis from the viewpoint of the legislative history and expressed Congressional policy. It is consistent with the Supreme Court's historical and recent analysis of cases where statutory and constitutional preemption claims were brought against state police power enactments.

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[12] "When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Federal Rule of Civil Procedure 56(e).

There is no conflict with this Court's decision in *Jones* v. *Rath,* supra., and that case was clearly distinguishable under the statute itself. Finally, petitioner was not denied any procedural rights and there is no cause for remand.

The Petition for Writ is inaccurate and misleading. It did not address the language in Section 678 that was the basis for the *Jones* v. *Rath* decision. It omitted to mention or describe the municipal material that was before the Court on its rulings, and it restricted its Statement of Facts to the contents of its allegations and its Motion for Preliminary Injunction.

For these reasons the joint named respondents request the denial of the Writ for Certiorari.

Respectfully submitted,

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